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No. 04-1170

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

MICHAEL LEE MARSH II,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a statute violate the Eighth Amendment if it provides for the death penalty to be imposed when the sentencing jury finds the aggravating and mitigating factors to be equal?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision below invalidates Kansas' death penalty based upon a misinterpretation of the Eighth Amendment. The court held that the possibility that a jury may impose death when the

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

aggravating and mitigating factors are equal is inconsistent with this Court's Eighth Amendment jurisprudence. This erroneous interpretation frustrates the wishes of Kansas citizens in seeing their moral priorities vindicated through the criminal justice system. In addition, it may lead to the loss of innocent lives. This threat to public safety and the integrity of a state's criminal justice system is contrary to the interests that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On June 17, 1996, Michael Lee Marsh, the defendant, murdered Marry Anne Pusch and her 19-month-old daughter, Marry Elizabeth Pusch (M.P.), in their home in Wichita, Kansas. *State* v. *Marsh*, 102 P. 3d 445, 452 (Kan. 2004). Marry received multiple gunshot wounds to her head and was stabbed in the heart. See *ibid.* The house was burned down using an accelerant. M.P. was not harmed before the fire, but she was severely burned and died six days later. See *ibid.*

Marsh, a friend of Marry's husband, confessed to shooting Marry and abandoning M.P. after he fled the residence. See *ibid.* He had intended to go to the home, tie up Marry and M.P., and then threaten their lives to obtain money from Marry's husband for a trip to Alaska. See *id.*, at 453. Marry and M.P. arrived earlier than he expected, and Marsh panicked, killing Marry. See *ibid.* He equivocated about the fire, first admitting to setting it, then claiming he could not remember, and finally denying it. See *ibid.* There was substantial circumstantial evidence corroborating Marsh's confession, including Marry's blood on his shoes. See *ibid.* Marsh sought to submit circumstantial evidence tying Marry's husband to the crimes, but the trial court refused because the state's evidence against Marsh was direct. See *ibid.*

A jury convicted Marsh of the capital murder of M.P., first-degree murder of Marry, aggravated burglary, and aggravated arson. *Ibid.* The jury found three aggravating circumstances:

"(1) Marsh knowingly or purposely killed or created a great risk of death to more than one person; (2) he committed the crime in order to prevent a lawful arrest or prosecution; and (3) he committed the crime in an especially heinous, atrocious or cruel manner." *Ibid.*; see Kan. Stat. Ann. § 21-4625(2), (5), (6). Marsh was sentenced to death for murdering M.P., life with a minimum term of 40 years for Marry's murder, 51 months for aggravated arson, and 38 months for aggravated burglary. See 102 P. 3d, at 452.

The Kansas Supreme Court had previously determined that the Kansas death penalty statute as written could violate the Eighth Amendment, because it would allow a death sentence to be imposed where the aggravating and mitigating factors were equal, see *State* v. *Kleypas*, 40 P. 3d 139, 232 (2001), over a strong dissent. See *id.*, at 294-300 (Davis, J., dissenting) (relying primarily on *Walton* v. *Arizona*, 497 U. S. 639, 651-652 (1990) (plurality opinion), overruled on other grounds in *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002)). The *Kleypas* Court did not strike the Kansas death penalty law, but instead allowed trial courts to avoid this supposed defect through jury instructions that changed the wording of the statute. See *id.*, at 233-234.

In the present case, the majority refused to reconsider the first holding of *Kleypas*, insisting that this Court "has never squarely addressed or decided the facial constitutionality of the equipoise provision before us." *Marsh*, 102 P. 3d, at 459. The Kansas Supreme Court then went on to overrule the second holding of *Kleypas*. The court held that Kansas' death penalty law could not be construed to avoid the purported Eighth Amendment violation, and struck down the death penalty in that state. See *id.*, at 464. The Kansas Supreme Court also reversed Marsh's conviction for murdering M.P., because the trial court erroneously excluded circumstantial evidence that tied the husband to the crimes. See *id.*, at 456-457. It affirmed the convictions and sentence for aggravated burglary and the

murder of Marry, but ordered a new trial on the capital murder and aggravated arson counts. *Id.*, at 466.

SUMMARY OF ARGUMENT

In addition to misinterpreting the Eighth Amendment and conflicting with the decisions of other jurisdictions, the decision of the Kansas Supreme Court involves a particularly important federal issue. Sentencing involves complex utilitarian policies such as deterrence, rehabilitation, and education. More importantly, sentencing reflects the moral priorities of society. Most people obey the law not because they fear getting caught, but because the system is just. The freedom to punish as severely as society sees fit is an essential component to this sense of justice in the system. Courts should tread with particular care in sentencing cases, but this is absent from the Kansas Supreme Court's opinion.

The present case runs roughshod over Kansas' sentencing system. Capital punishment has an importance that far outweighs its relative infrequency. Sitting at the apex of punishment, it establishes moral priorities that resonate throughout the system. Invalidating the entire death penalty upsets the punishment system's equilibrium.

The Kansas Supreme Court's decision may also threaten public safety. Recent studies substantially bolster the case for the deterrent value of capital punishment. Advanced statistical and econometric analysis indicates that each execution lowers the murder rate, saving up to 18 lives per year, while taking people off of death row may increase the murder rate. Although not conclusive, these studies raise significant public safety concerns about the Kansas decision. Combined with the frustration of the public's will, these factors alone justify certiorari.

The fact that the defendant's capital murder conviction has been reversed does not deprive this Court of the final judgment

necessary for its jurisdiction. If the case is not reviewed now, then Marsh is likely to be retried under a system without a death penalty. This will prevent review of the Kansas Supreme Court's Eighth Amendment ruling because he will not receive a death sentence on retrial. That threat provides the necessary finality for jurisdiction.

ARGUMENT

This Court usually grants certiorari review only where there is an important federal issue and a conflict between jurisdictions, an important federal question that this Court has not addressed, or an important federal question decided in a way that conflicts with this Court's decisions. See Supreme Court Rule 10. The petition for writ of certiorari demonstrates that the Kansas Supreme Court in this case misinterpreted this Court's Eighth Amendment jurisprudence in a way that conflicts with decisions of federal circuit courts and state supreme courts. See Petition for Writ of Certiorari 5-10. *Amicus* will not repeat these arguments. Instead, it will focus on the importance of the federal issues involved. Because the Kansas Supreme Court invoked the Eighth Amendment to invalidate capital punishment in Kansas, this case necessarily involves important federal issues.

The state court's decision (in *Kleypas*) or refusal (in the present case) to interpret a statute to avoid a perceived conflict with federal law is a question of state law. However, that perception of conflict is a federal question, within this Court's jurisdiction to review. See, *e.g.*, *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984); *Ohio* v. *Reiner*, 532 U. S. 17, 20 (2001) (*per curiam*); R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 199-200 (8th ed. 2002).

I. Setting the appropriate level of punishment is one of the most essential functions of government.

The decision of the Kansas Supreme Court to invalidate the death penalty in Kansas, see *State* v. *Marsh*, 102 P. 3d 445, 464 (2004), strikes at one of the essential functions of government. Few policies are more important to society than setting the level of punishment for crimes. Punishment serves important crime limitation policies and expresses society's fundamental values. Decisions that limit society's freedom to punish as it sees fit necessarily involve important issues. These issues are more worthy of the Court's consideration than less important cases.

Criminal justice is a field in which courts should tread with particular care. "The most basic function of any government is to provide for the security of the individual and his property." *Miranda* v. *Arizona*, 384 U. S. 436, 539 (1966) (White, J., dissenting), quoted in *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). Punishment is integral to any crime prevention scheme "to influence human conduct away from the undesirable and toward the desirable." 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5(a), p. 37 (2d ed. 2003). Criminal law cannot exist without punishment.

There are several utilitarian justifications for punishment, such as deterrence, restraint, and rehabilitation. See *id.*, at 37-47. While punishment serves all of these functions, they do not completely explain why we must punish criminals and why society needs the freedom to impose the punishment that it deems appropriate. Even with the renewed public emphasis on law enforcement, many perpetrators face little risk of being caught, let alone punished. It has been estimated that one who commits a homicide has a 44.7% chance of being caught, convicted, and imprisoned, while rapists have a 12% chance and robbers a 3.8% chance of being punished for their crimes. See Robinson & Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 459 (1997). Lesser crimes are even less likely to be punished with punishment being "a 100-to-1 shot"

for crimes like burglary, assault, and larceny." *Ibid.* Since offenders tend to underestimate their chance of getting caught, this problem is compounded. See *id.*, at 460. Since some offenders cannot be deterred, or believe that they will not be caught, deterrence is only an incomplete explanation for punishment. Similar criticisms can be raised against the other utilitarian rationales for punishment. Incapacitation is completely effective only for the comparatively rare severe sentences, and rehabilitation as the primary goal has been rejected by many, including Congress. See Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 434-435 (1992). While these policy goals are still important, sentencing also serves another purpose.

In addition to restraining crime, sentencing expresses society's fundamental values. This Court's Eighth Amendment jurisprudence recognizes the important role that retribution plays in systems of punishment. See, *e.g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (lead opinion); *Ewing* v. *California*, 538 U. S. 11, 25 (2003); *Hudson* v. *United States*, 522 U. S. 93, 101 (1997) (one of the "traditional goals of punishment"). Retribution is not merely sating the public's thirst for vengeance. Instead, it is part of the glue which holds society together.

The fact that most people obey the law indicates that something more than deterrence prevents crime. Personal morality helps to explain why most of us are not criminals. See T. Tyler, Why People Obey the Law 44-45 (1990). Punishment serves society by setting and vindicating its moral priorities.

This mix of policy and morality makes judicial review of sentencing particularly difficult. Preventing a particular penalty or form of punishment interferes with society's ordering of moral priorities that establishes its sense of justice in the criminal law. A system that does not punish criminals with the severity that society deems appropriate loses some of the respect that helps maintain public order. The moral questions

inherent in sentencing can only be answered by the people through their legislature. See *Gregg*, 428 U. S., at 175.

The policy questions of deterrence, incapacitation, rehabilitation, and other factors further complicate constitutional review of sentencing. While there is a tradition of a judicial role in choosing a sentence for a particular criminal from a range of alternatives, see *Koon* v. *United States*, 518 U. S. 81, 113 (1996), the determination of what sentencing considerations are appropriate are " 'peculiarly questions of legislative policy.' " *Gregg*, 428 U. S., at 176 (quoting *Gore* v. *United States*, 357 U. S. 386, 393 (1956)). While the Eighth Amendment confers jurisdiction to review sentences and sentencing procedures, courts should take care in these cases. The complex policies, vital public interests, and the important moral questions surrounding sentencing all counsel for a judicial caution that is absent from the decision below.

This Court's often tangled and contentious Eighth Amendment jurisprudence demonstrates the inherent complexity of the constitutional law of sentencing. The noncapital proportionality review cases are so conflicted that there is little clearly established precedent. See *Lockyer* v. *Andrade*, 538 U. S. 63, 72-73 (2003). There is also considerable tension in Eighth Amendment death penalty procedure. The mitigation and guided discretion requirements of Eighth Amendment capital punishment law are inherently conflicted. See *Graham* v. *Collins*, 506 U. S. 461, 479 (1993) (Thomas, J., concurring). If constitutional review of sentencing is problematic for this Court, it is necessarily difficult for the lower courts. If the states and the federal circuits are to review sentencing cases, then frequent guidance from this Court is essential to a healthy body of law.

That need is particularly acute in the present case. While all sentencing decisions are important, some are more important than others. This case raises vital issues that warrant this Court's review.

II. A decision invalidating a state's entire capital punishment system particularly deserves review by this Court.

This case stands at the apex of importance in sentencing cases. The Kansas Supreme Court did not just invalidate a single sentence or a trivial part of Kansas' sentencing scheme. In striking down Kansas' death penalty, the state Supreme Court cut the top off of Kansas' punishment system. Although it is one of the least used punishments, the death penalty is much more important than its relative infrequency suggests. The death penalty establishes moral priorities that resonate through the entire system. In addition, this decision deprives Kansas of a potentially powerful deterrent to murder that can save innocent lives. These compelling considerations strongly counsel in favor of certiorari review.

A. Moral Priorities.

When a court strikes down a legislatively enacted punishment, it interferes with society's ordering of moral priorities that establishes its sense of justice in the criminal law. This problem is exacerbated in the context of the death penalty. Since it is reserved for the most severe crimes, and is the most severe punishment, capital punishment is morally the most important punishment in a system that employs it.

As the most severe and by far the most publicized punishment, the death penalty sets an example that resonates throughout the justice system and society. It expresses society's ultimate revulsion at the crime it considers the worst. See *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (lead opinion). The particular importance of capital punishment to those jurisdictions that employ it is reflected in the overwhelming response of the states to *Furman* v. *Georgia*, 408 U. S. 238 (1972). After *Furman* invalidated all the then-existing capital punishment laws, the reaction was overwhelming with 35 states enacting new capital punishment laws. See *Gregg*, *supra*, at 179-180, and n. 23. The *Furman* decision also changed public

opinion on the death penalty in an unexpected direction. A prior long-term decline in support for capital punishment suddenly and dramatically reversed after *Furman*. See Scheidegger, Capital Punishment in 1987, The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 107 (1987). This change influenced the decision to allow the death penalty to be reinstated in *Gregg*. See 428 U. S., at 179 (lead opinion) ("it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction").

A similar reaction to the decision below is taking place in Kansas. Bills to change Kansas death penalty law are coursing through the legislature, and the decision has spawned a movement to change how Supreme Court and Court of Appeals judges are selected, see S. Painter, Death penalty bills hit Senate, The Wichita Eagle (Feb. 8, 2005), http://www.kansas.com/mld/kansas/news/legislature/10842120.htm, although that effort is on hold pending this Court's decision on certiorari in this case. See Associated Press, Penalty's revival urged, The Topeka Capital-Journal (Feb. 23, 2005), http://legislature.cjonline.com/stories/022305/leg_deathpen.shtml. The State Senate has even adopted a resolution asking the Court to grant certiorari in this case. See Appendix. While legislation may reinstate Kansas' death penalty in the long term, the immediate consequence is to destroy what the people of Kansas intended. Even if the death penalty is reinstated, the Ex Post Facto Clause, see U. S. Const., Art. I, § 10, cl. 1, or double jeopardy may prevent capital punishment from being applied to crimes committed before the restoration. If the present case is not reversed by this Court, then Kansas may forever lose the opportunity to apply the ultimate sanction to several of its worst criminals, including a quadruple murderer. See T. Rizzo & D. Klepper, Kansas justices rule death penalty unconstitutional, The Kansas City Star (Dec. 17, 2004), http://www.kansascity.com/mld/kansascity/news/nation/10444309.htm. The present case is Kansas' own *Furman*. Given how central capital punishment is to the moral order of punishment

decision, this drastic result deserves extra consideration from this Court.

B. Lost Deterrence.

The present case may not just cost Kansas its moral priorities in sentencing. It may also cost innocent lives. Since *Furman*, there has been a sharp dispute over the deterrent effect of capital punishment. See Sunstein & Vermeule, Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs, AEI-Brookings Joint Center for Regulatory Studies, Working Paper 05-06, p. 7 (Mar. 2005), http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1131. Recent studies considerably bolster the case for capital punishment's deterrence. The leading study looked at data from 3,054 United States counties between 1977 and 1996, see Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344, 359 (2003), and found that death sentences and executions substantially reduce the murder rate. The authors estimated that each execution led to 18 fewer murders. See *id.*, at 369.

Other recent studies find a similar relationship between capital punishment and deterrence. A study of capital punishment at the state level since 1978 estimates that each execution deters an average of 14 murders. See Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 190 (2004). Another study of state level data between 1977 and 1997 estimates that each execution deters about 5 murders. See Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. L. & Econ. 453, 474 (2003). The authors also find that removing people from death row and commutations increase the murder rate. See *ibid.* Other research shows a weaker, but still statistically significant relationship between capital punishment and the murder rate. See Yunker, A New Statistical Analysis of Capital Punishment

Incorporating U. S. Postmoratorium Data, 82 Soc. Sci. Q. 297, 310-311 (2001) (using national data, the deterrent "effect is statistically significant at a high level of confidence . . .").

While criminology is not nearly as exact as the hard sciences, support for the deterrent effect of capital punishment is much stronger now than when *Furman* was decided. Since the concept of deterrence is consistent with basic human nature, opponents of the deterrent value of the death penalty have to meet a considerable burden of proof. They have not met this. Striking down Kansas' death penalty, even if subsequently remedied by the state legislature, may cost the lives of innocent Kansans. The potential consequences of the Kansas Supreme Court's decision justify certiorari on their own, and they are certainly sufficient to tip the balance when there are substantial constitutional issues and a conflict between jurisdictions.

The claim that "death is different" is a common justification for imposing greater procedural restrictions in capital sentencing. See, *e.g.*, *Gardner* v. *Florida*, 430 U. S. 349, 357-358 (1977); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality). If this is the case, then decisions striking down a state's capital punishment system should also be treated differently. When the federal Constitution is invoked to eliminate the most important punishment in a state, this Court should pay particular attention. Given the substantial federal questions and the conflict between jurisdictions spelled out in the petition for writ of certiorari; the case for certiorari is compelling.

III. The reversal of the capital murder conviction does not preclude certiorari review.

The Kansas Supreme Court reversed Marsh's conviction for capital murder and aggravated arson. See *supra*, at 3. This does not deprive the case of the final judgment necessary for certiorari jurisdiction. See 28 U. S. C. § 1257(a). While Marsh will be retried for capital murder, he will not be subject to the

reimposition of his death sentence because the Kansas Supreme Court invalidated Kansas' death penalty law under the Eighth Amendment. The Kansas Supreme Court's ruling that the state death penalty law is invalid under the Eighth Amendment is therefore final with respect to Marsh.

If Marsh is retried and sentenced without a valid death penalty law then a death sentence cannot be imposed on him. In that case, double jeopardy prevents the reimposition of capital punishment if Kansas' death penalty is subsequently revived through legislation. See *supra*, at 10. When further proceedings could effectively immunize the constitutional issue from further review, such as by acquittal, finality does not prevent immediate review. See *California* v. *Stewart*, decided with *Miranda* v. *Arizona*, 384 U. S. 436, 498, n. 71 (1966). There is a much greater risk of losing the federal issue in this case, so the Eighth Amendment ruling is final.

The possibility of Kansas reviving its death penalty law before Marsh's retrial is too remote to influence the jurisdiction issue. Legislative efforts to deal with the Kansas Supreme Court's decision have been put on hold, pending this Court's disposition of the case. See *supra*, at 10. In the unlikely event that a new death penalty law could be refashioned in time for Marsh's retrial, imposing this new law on him would raise a double jeopardy issue. See *Dobbert* v. *Florida*, 432 U. S. 282 (1977). If this Court does not grant certiorari, then there is a substantial chance that the state will be precluded from imposing the death penalty against Marsh due to the Kansas Supreme Court's misinterpretation of the Eighth Amendment. Finality requires nothing more.

CONCLUSION

The petition for writ of certiorari should be granted.

April, 2005

Respectfully submitted,

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APPENDIX

SENATE RESOLUTION No. 1820

A RESOLUTION requesting the United States supreme court to grant certiorari and reverse the Kansas supreme court's ruling in *State v. Marsh*.

WHEREAS, The current Kansas death penalty law was enacted in 1994 and was challenged in *State v. Kleypas*, 272 Kan. 894, decided by the Kansas supreme court December 28, 2001; and

WHEREAS, The Kansas supreme court unanimously affirmed Kleypas' conviction but set aside his death sentence because of a faulty jury verdict form; and

WHEREAS, The *Kleypas* court split 4-3 on a constitutional challenge to the death penalty statute based on the manner in which jurors were instructed to weigh aggravating and mitigating circumstances when deciding whether to impose a death sentence, but all seven Kansas justices in the *Kleypas* court found the Kansas death penalty law to be constitutional, either on its face or as construed; and

WHEREAS, The *Kleypas* majority, consisting of Justices Tyler C. Lockett, Donald L. Allegrucci, Fred N. Six, and Edward Larson, did not invalidate the Kansas death penalty statute, but held that the so-called ''weighing equation,'' as applied, was unconstitutional: ''Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise.''; and

WHEREAS, The *Kleypas* dissent, written by Justice Davis and joined by Chief Justice McFarland and Justice Abbott, did not invalidate the Kansas death penalty statute because ''the weighing equation was constitutional as written.'' The dissent further noted that the United States supreme court has held that

as long as the weighing equation does not preclude the jury from considering relevant mitigating evidence, the specific method of balancing the aggravating and mitigating factors may be left up to the state; and

WHEREAS, In reaching the decision, the court reasoned that the Kansas legislature intended to enact a constitutional death penalty law and thus concluded that K.S.A. 21-4624(e) is not void on its face, but only in its application. The majority held that by requiring the ''tie'' to go to the defendant, the intent of the legislature may be carried out in a constitutional manner: ''By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the eighth amendment prohibition against cruel and unusual punishment,'' the court concluded; and

WHEREAS, The *Kleypas* court held that the wording of a verdict form was confusing, misleading and inconsistent with Kansas law and improperly implied to a jury that the jury, in order to spare Kleypas' life, was required to be unanimous in its decisions against death. To cure that infirmity, the court provided substitute language for verdict forms to be used in all death penalty cases in Kansas. The revised verdict form, consistent with Kansas law, makes it clear that a single juror may block a death verdict; and

WHEREAS, After the *Kleypas* case was decided, both the senate judiciary committee and the house judiciary committee conducted hearings regarding the *Kleypas* decision and the Kansas death penalty law. In addition to hearings during the 2002 legislative session, the matter was studied further during interim committee hearings in the autumn of 2004. The focus

of the hearings was to determine what legislative response, if any, was needed to ensure the constitutionality of the Kansas death penalty law in light of the *Kleypas* decision; and

WHEREAS, Based on testimony received during those hearings, the legislature relied on the *Kleypas* court's decision and concluded that no amendment to statute was necessary because the *Kleypas* court has upheld the constitutionality of the death penalty statute and had cured the apparent flaw in the weighing equation by revising future jury instructions; and

WHEREAS, Only three years after deciding the *Kleypas* case the Kansas supreme court decided *State v. Marsh*, opinion number 81,135, on December 17, 2004; and

WHEREAS, In *Marsh*, the supreme court ruled 4-3 that the Kansas death penalty statute is unconstitutional because of its inclusion of the ''weighing equation'' - the same defect that the supreme court purported to cure with the prospective change in jury instructions it ordered in *Kleypas*; and

WHEREAS, In *Marsh*, the majority agrees with the four justices who decided in 2001's *State v. Kleypas* that the statute as written violated the eighth and fourteenth amendments but, unlike in *Kleypas*, the *Marsh* majority proceeded to invalidate the entire statute rather than severing the weighing equation provision from the remainder of the statute and allowing a change in jury instructions to cure the flaw; and

WHEREAS, The three justices who dissented in *Marsh* (Justice Davis, Chief Justice McFarland and Justice Nuss) continue to believe the death penalty statute, as written, is constitutional: ''There seems to be a general feeling among the majority that the weighing equation which mandates death in the highly unlikely event that the jury finds the aggravating and mitigating factors to be exactly equal in weight is somehow 'unfair.' While it is certainly within the province of this court to interpret the eighth amendment, we cannot do so in a vacuum. We cannot simply rely on our inchoate feelings, but

instead have a duty to examine, analyze, and apply the United States supreme court's jurisprudence on the matter.''; and

WHEREAS, The *Marsh* majority states that the United States supreme court has never directly addressed the issue of the weighing equation presented in *Kleypas* and again in *Marsh*; and

WHEREAS, Chief Justice McFarland says in her separate dissent that legally the Court should follow the *Kleypas* precedent: ''In *Kleypas*, in a 4 to 3 decision, all seven justices agreed the Kansas death penalty law was constitutional, either as construed in a very minor respect (majority) or as written (dissent). To now strike down the Kansas death penalty law, is, in my opinion, wholly inappropriate and unjustified.''; and

WHEREAS, Justice Nuss also writes separately and says the United States supreme court has already implicitly approved of the death penalty sentencing scheme adopted in Kansas. In his opinion, an Arizona weighing equation ''functionally identical'' to the Kansas equation was approved by the United States supreme court in its 1990 *Walton v. Arizona* decision, and *Walton* therefore controls the result in *Marsh*; and

WHEREAS, It may be beyond the power of the legislature to amend the Kansas statute retroactively in order to apply a clearly constitutional death penalty law to the seven persons now on death row. Only a decision by the United States supreme court to overturn the Kansas supreme court's decision in *Marsh* is likely to result in the continued application of the death penalty law to those persons already sentenced to death; and

WHEREAS, The State of Kansas finds itself in this predicament not because of any change in the death penalty law but because of a change in the composition of the Kansas supreme court between the *Kleypas* and *Marsh* decisions; and

WHEREAS, Manifest injustice will result if the United States supreme court declines to review the *Marsh* case on appeal; and

WHEREAS, We believe that the Kansas death penalty law meets the requirements of the Kansas constitution and the United States constitution: Now, therefore,

Be it resolved by the Senate of the State of Kansas: That, based on the evidence presented, we do hereby acknowledge and affirm that the opinion of the Kansas senate is that the Kansas death penalty law as written is constitutional and that if any single provision of that law is found to be unconstitutional that provision should be severed from the rest and other provisions of the statute upheld; and

Be it further resolved: That, the Kansas supreme court and the United States supreme court should be informed that the Kansas legislature relied on the Kansas supreme court's decision in *State v. Kleypas* in deciding not to amend the Kansas death penalty law to alter the weighing equation provisions during hearings in 2002 and 2004; and

Be it further resolved: That, the Kansas senate respectfully requests that United States supreme court grant certiorari to hear the *Marsh* case and find Kansas death penalty law constitutional as written or, in the alternative, as applied through the cure imposed by the Kansas supreme court in the *Kleypas* decision.

Senate Resolution No. 1820 was sponsored by Committee on Judiciary.

I hereby certify that the above RESOLUTION originated in the SENATE, and was adopted by that body

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President of the Senate.

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Secretary of the Senate.